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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion and order of the three-judge district court (J.S. App. A, pp. 1a–44a) is reported at 346 F. Supp. 578.

JURISDICTION

The order of the three-judge district court declaring the statute unconstitutional and enjoining its enforcement was entered on July 31, 1972. A notice of appeal to this Court was filed on August 25, 1972, and the Court noted probable jurisdiction on December 12,

1972. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether the prohibition of the Hatch Act against federal employees taking "an active part in political management or in political campaigns" is unconstitutional on its face.

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 7324 provides:

> (a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—
>
> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
>
> (2) take an active part in political management or in political campaigns.
>
> For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.
>
> (b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.
>
> (c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole

or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

(d) Subsection (a)(2) of this section does not apply to—

(1) an employee paid from the appropriation for the office of the President;

(2) the head or the assistant head of an Executive department or military department;

(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

(4) the Commissioners of the District of Columbia; or

(5) the Recorder of Deeds of the District of Columbia.

5 U.S.C. 7326 provides:

Section 7324(a)(2) of this title does not prohibit political activity in connection with—

(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others

of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

The pertinent regulations of the Civil Service Commission, 5 C.F.R. 733.101, 733.111, 733.122, and 733.124, are set forth in Appendix B to the Jurisdictional Statement, pp. 45a–49a.

STATEMENT

Appellees are a federal employees' postal union, certain individual federal employees, and local Democratic and Republican political committees. They brought this class action in the district court challenging the constitutionality of the provision of the Hatch Act (5 U.S.C. 7324(a)(2)) that bars federal employees from taking an "active part in political management or in political campaigns." Alleging, *inter alia,* that the individual employees either had violated the Act and were threatened with its enforcement or desired to engage in prohibited activities (App. 6–10), the appellees sought a declaration that the Act is unconstitutional and an injunction against its enforcement. A three-judge district court, in a divided decision, held Section 7324(a)(2) invalid and enjoined its enforcement. It stayed its order pending appeal to this Court.

The court recognized the "appropriateness of [the] governmental objective" of the Hatch Act (J.S. App. A, p. 3a). The defect in the statute, the court held, was the definition of the expression "an active part in political management or in political campaigns" as

meaning "those acts of political management or political campaigning which were prohibited [for federal employees] * * * before July 19, 1940, by determinations of the Civil Service Commission * * *." The court held that this definition required federal employees to consider, as a guide to their political conduct, the entire body of pre-1940 administrative rulings "rigidly incorporated" into the Act (*id.* at 9a). These rulings, according to the court, often proscribed constitutionally permissible conduct and were inconsistent with each other and with the language of the Hatch Act itself.

Although recognizing that "[t]he incorporated rulings were to serve generally as an upper limit on future interpretations or expansions of previously prohibited political activity * * *" (*id.* at 6a), the court held that "no constitutionally acceptable mechanism was provided for accomplishing this result" (*id.* at 6a–7a). It rejected the administrative gloss placed on the statute by the Commission's regulations and decisions, holding that Congress conferred no power on the Commission to clarify or define the statutory prohibition (*id.* at 7a, 9a). As a result, the court concluded that the statute was both overly broad and impermissibly vague, characterizing this as "a classic case of a statute which in its application has a 'chilling effect' unacceptable under the First Amendment" (*id.* at 11a).

The court recognized that this Court had upheld the constitutionality of the Hatch Act in *United Public Workers* v. *Mitchell*, 330 U.S. 75. It stated, however,

that "the *Mitchell* opinion explicitly left open the question of the constitutionality of the incorporation-by-reference section of the Act" (*id.* at 13a). Furthermore, even if *Mitchell's* holding were considered binding, the court characterized it as "inconsistent with subsequent decisions delineating First Amendment freedoms. These precedents, which developed the 'least restrictive alternative test' for governmental incursions into the area of free speech, undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based. The decisions, coupled with changes in the size and complexity of public service, place *Mitchell* among other decisions outmoded by passage of time" (*ibid.;* footnote omitted).

Judge MacKinnon dissented. He concluded that the claim of overbreadth lacked validity because Section 7324(a)(2) did not incorporate all pre-1940 administrative decisions, but only those consistent with other provisions of the Act and with evolving concepts of First Amendment rights (*id.* at 33a). Pointing to the regulations promulgated by the Civil Service Commission (J.S. App. B, pp. 45a–49a), which set forth in considerable detail the principle prohibited and permitted political activities, as well as to the Commission's practice of rendering advisory opinions on request, he concluded that the federal employee could ascertain with reasonable precision what constitutes prohibited political activity, and that the statute was thus "not impermissibly vague in the constitutional sense" (J.S. App. A, pp. 42a–43a).

ARGUMENT

INTRODUCTION AND SUMMARY

We do not understand this case to raise a question as to whether Congress may constitutionally prohibit active political management or political campaigning, properly defined, by federal civil servants. Rather, the question is whether Congress has in the Hatch Act defined the prohibition in a manner that is impermissibly vague or that overbroadly sweeps within its proscription activities that Congress may not properly restrict—*and*, if either of these vices is present, whether a clarifying or limiting construction of the statute, or excision of the unlawful prohibitions, is not feasible, so that the only recourse to assure adequate protection of constitutional rights of federal employees is an invalidation of the entire proscription on its face.

It is important, at the outset, to state clearly what the Hatch Act does not do:

(1) It is not a censorial law addressed to the suppression of unpopular views; it does not single out persons who advocate particular political viewpoints, or penalize any one for association with persons or organizations oriented to such advocacy. See, *e.g.*, *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589. Rather, it applies in exactly the same way regardless of the viewpoint being advocated. Cf. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367.

(2) It is not a law that is being used to further an

impermissible practice of discrimination against or intimidation of racial or other minorities. See, *e.g.*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415.

(3) It is not a law that forces individuals to disclose their association with unpopular causes or organizations, thereby exposing them to public obloquy and inhibiting the organizations' membership and fund-raising prospects. See, *e.g.*, *Shelton* v. *Tucker*, 364 U.S. 479; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449.

(4) It is not a sweeping prohibition of all political activities; most importantly, it does not prohibit or inhibit the adherence to or expression of any beliefs or opinions on political subjects or candidates. Not one federal employee's vote goes uncast because of the Hatch Act, nor one idea unexpressed; rather, the Act is tailored to protect these values, while circumscribing political activities, beyond speech and voting, that Congress has deemed inimical to the maintenance of an impartial and efficient civil service.

These considerations, which differentiate this case from many of the decisions from which current First Amendment doctrines have evolved, dictate the exercise of caution by the judiciary before applying the relatively drastic remedy of facial invalidation in the event the Hatch Act is found defective in any particulars. See Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 918–927 (1970).

The Hatch Act legislates in an area of paramount governmental concern, dealing with core problems of the operation of the government itself. This consideration, as the Court pointed out in *Pickering* v.

Board of Education, 391 U.S. 563, 568, is relevant to the First Amendment analysis:

> "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents, supra,* at 605–606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The objectives served by the Hatch Act's prohibitions on active political management and campaigning are readily apparent:

(1) By restricting the government employee's involvement in partisan politics, the prohibition diminishes the likelihood that the employee will allow partisan political predilections to interfere with the impartial execution of the government's business in accordance with the policies dictated by Congress—policies that he as a political candidate or adherent of a political candidate might reject or seek to change. Of course, it may sometimes happen that the employee, even if not actively involved in politics, will disapprove of policies and programs that he is charged

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with implementing; but it is reasonable to anticipate that active, partisan compaign involvement would materially increase that hazard.

(2) By precluding active, partisan campaigning, the Act makes it impossible for the party in power to turn the federal civil service into a useful instrument for affecting the outcome of elections. This concern figured importantly in the enactment of the Hatch Act, because such abuses had in fact been widespread in the 1936 and 1938 elections and were known to be a political fact of life in many States. See pp. 15–17, *infra.*

(3) Equally important with the concern that partisan political activity may detract from the impartiality of the performance of government employees is the concern that such activities, being observed by the public, will erode public confidence in the impartial administration of the federal government.

(4) The prophylactic approach of the Hatch Act also serves to assure that government employees will not be or feel themselves compelled to engage in unwanted partisan political activities in order to curry favor with their superiors and enhance their prospects for continued employment or for advancement. Such pressures can be brought to bear on employees in extremely subtle ways beyond the effective reach of any anti-coercion regulation, no matter how tightly drawn. Indeed, in many instances the employee might feel that his prospects for job advancement would be enhanced by political activity aligned with his superior's partisan predilections, even though his su-

perior may have done or said nothing providing objective grounds for such feelings. The restrictions adopted by Congress in the Hatch Act insure that the employee will not feel these pressures—real or imagined—by removing his capacity to respond to them by working for what he perceives to be his superior's partisan political interests. See Statement of Civil Service Commission Chairman Hampton, Hearings on S. 3374 and S. 3417 before the Senate Committee on Post Office and Civil Service, 92d Cong., 2d Sess., pp. 51–52, 56.

Thus, the Hatch Act's restrictions on partisan political activities serve not only objectives of efficiency in the government service, but also important First Amendment values. The restrictions protect the integrity of the nation's political processes from the danger of disruption by a partisan political machine manned by substantial numbers of government employees; at the same time, the employees themselves are protected from pressures that might otherwise cause them to engage in political activities not of their own choosing.

The district court misconstrued the statute by holding that all pre-1940 decisions of the Commission had been rigidly incorporated into the definition of prohibited political activities, including those inconsistent with the Hatch Act's own guarantee of the right of expression on political subjects and candidates and the right of full participation in non-partisan political matters. It further erred in refusing to consider the authoritative interpretation of the Hatch Act's re-

strictions embodied in regulations of the Civil Service Commission.

As authoritatively construed by the Commission, the Hatch Act's restrictions are neither impermissibly vague nor overbroad. Permitted and prohibited activities are defined in a clear and informative manner providing adequate guidance to affected employees as well as clear guidelines for fair and impartial administration of the prohibitions. While the regulations do not specifically cover every imaginable situation that might arise—an impossible goal, given the complexity of the subject matter—they do cover the bulk of political activities in which government employees are likely to consider engaging; and the Commission has an advisory opinion procedure to afford guidance to interested employees with respect to interstitial situations not specifically covered by the regulations.

Set against this backdrop, the district court erred in holding the Hatch Act vague and overbroad. Moreover, to the extent that there are elements of vagueness or overbreadth present in connection with particular facets of the political activity prohibition as construed and applied, the proper remedy for such deficiencies is not facial invalidation of the entire prohibition. There is ample room for an appropriate construction of the Act's prohibitions, and particular offensive application can readily be excised by review of the individual prohibitions set forth in the regulations.

The district court's invalidation of the statute was based on what might be termed "procedural" or draft-

ing defects. The court did *not* hold that any of the provisions of the restriction against partisan political activities currently being applied by the Commission under its regulations and decisions in political activity cases are invalid. Nor would any such holding be warranted. In view of the important objectives that Congress sought to attain by this legislation, it was, as this Court held in *United Public Workers* v. *Mitchell*, 330 U.S. 75, well within the range of reasonable and permissible choices open to Congress to select a prophylactic approach under which active campaigning of any sort was barred, although the right to express opinions was preserved. That holding retains its validity today, and it is such a policy that the Commission is enforcing. Whether a less restrictive approach should be adopted, involving a gamble that greater freedom to engage in partisan politics would not bring about the consequences feared by Congress in imposing restrictions on political activity, is a judgment properly left to Congress.

I. THE LEGISLATIVE HISTORY OF THE HATCH ACT AND THIS COURT'S DECISIONS UPHOLDING ITS CONSTITUTIONALITY

In order to place the statutory and constitutional issues in this case in proper perspective, we shall first set forth the legislative history of the Hatch Act and then discuss briefly this Court's decisions in *United Public Workers* v. *Mitchell*, 330 U.S. 75, and *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, which more than 25 years ago upheld the constitutionality of the Act.

The Hatch Act was the culmination of many years' experience in this country in attempting to provide a

merit system in federal employment that would be free from partisan politics. We describe that history in the Appendix, *infra,* pp. 63–70. It shows that the problems of political patronage in federal employment existed since the early days of the Republic, that various Presidents attempted to correct the situation by promulgating regulations prohibiting political activities by federal employees, and that Congress finally dealt with the problem in 1883 when it passed the Civil Service Act.

That Act created the Civil Service Commission as the agency to administer the civil service and declared that "no person in the public service is for that reason under any obligations * * * to render any political service" and does not have "any right to use his official authority to influence or coerce the political action of any person or body." 22 Stat. 403, 404. Pursuant to his rule-making authority under the Act, President Arthur, on May 7, 1883, promulgated the original Civil Service Rules. These rules contained no specific prohibition against participation by federal employees in political campaigns, but merely restated the language of the Act, providing in Rule I that "no person in [the executive civil] service shall use his official authority or influence either to coerce the political action of any person or body or to interfere with any election." 8 Richardson, *Messages and Papers of the Presidents* 161 (1898).

In 1907, President Theodore Roosevelt issued Executive Order No. 642, which provided in part as follows:

> No person in the Executive civil service shall use his official authority or influence for the

> purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns. [Twenty-fourth Annual Report of the Civil Service Commission, p. 104 (1908).]

Civil Service Rule I was promptly amended to contain this language, which continued in effect without change until the Hatch Act was passed in 1939.

From 1886 to the enactment of the Hatch Act, the Commission decided more than 2600 cases involving alleged political activity in violation of Civil Service Rule I. Although many of these decisions did not specify the particular political activity involved, a number did discuss and elucidate the prohibition against political activity in Civil Service Rule I. Thus, when the Hatch Act was enacted, Civil Service Rule I had a well-defined and generally understood meaning, although its application in some borderline situations may have been unclear.

A. THE ENACTMENT OF THE HATCH ACT

1. In 1939, Congress enacted the Hatch Act, which, among other things, imposed upon non-classified federal employees the same restrictions against political management and campaigning as had theretofore been applied to classified workers by Civil Service Rule I. Passage of the Act was a direct result of electoral

and related abuses that had occurred during the 1936 and 1938 national elections.

During the 75th Congress, charges were made that various of the emergency relief agencies which had been established during the 1930's to combat the problems of the depression were being utilized for political purposes. The Senate established a bipartisan committee to investigate the charges. The committee, which was chaired by Senator Sheppard, issued a report in 1938 finding that there had been widespread "manipulations of Federal relief appropriations, as well as intimidation of relief workers during the primary and general elections of 1936 and 1938 * * *" (84 Cong. Rec. 9598). With respect to the latter practice, it was revealed that there were numerous instances of relief project officials "levying political tribute" (*ibid.*) on relief workers. Not only were relief workers required to contribute funds to the campaigns of specific partisan candidates, but also, through importunings and intimidation, attempts were made to "capture" the vote of these workers (84 Cong. Rec. 9606):

> Many of those in charge of this relief [W.P.A.] boldly insisted that voters change their party registration and vote for candidates favored by those in charge of the W.P.A., and if they refused they were denied W.P.A. work or were discharged.

Many in Congress saw the federal work force, which had been suddenly expanded in response to the economic problems confronting the Nation, developing "into a powerful, corrupt, partisan, political machine"

(*ibid.*). For example, it was charged that "[t]ens of thousands of people receiving large salaries were rendering no service to the people [but, instead,] were devoting their time in pernicious political activities" (*ibid.*). See also 84 Cong. Rec. 9604. Section 9(a) of the Hatch Act of 1939 (53 Stat. 1148, et seq., as amended, 5 U.S.C. (1964 ed.) 118i(a)), *et seq.* was designed to combat the development of a "partisan, political machine" made up of federal employees by prohibiting such employees from actively engaging in partisan affairs. As one Congressman explained (84 Cong. Rec. 9603):

> If this Congress continues its present practice we are going to foster and approve the most gigantic political machine that is known in any nation anywhere. This bill [the Hatch Act] will prevent those who are appointed to positions under the Federal Government from taking an active part in the management of political campaigns or engaging in them actively. If they do take such part and active interest they will lose their jobs.

Section 9(a) provided, in pertinent part, that "[n]o officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns." In discussing the bill on the Senate floor, Senator Hatch made it clear that Section 9(a) was intended as "a copy of the present civil service rules" (84 Cong. Rec. 4303). See also S. Rep. No. 221, 76th Cong., 1st Sess., p. 2.

As originally passed by the Senate, Section 9(a) was the same as Rule I in all significant respects, in-

cluding the allowance of only *private* expression of opinion on political subjects. See 84 Cong. Rec. 4192. In the House, however, the provision was amended to strike the word "privately," so that, as finally enacted, it provided: "All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects." See 84 Cong. Rec. 9622–9626. Senator Hatch subsequently explained the congressional purpose in making this change from the Civil Service rule (86 Cong. Rec. 2623):

> More than that, Mr. President, to make assurance double sure at the last session that no such right [of free speech] should be curtailed, in the bill we then passed we expressly provided that all persons should have the right to express their opinions on all political subjects, and the word "privately," which appears in the civil-service rule, was deliberately stricken out and the President of the United States, in commenting on that fact in his message, pointed out that there was involved in the legislation no curtailment or abridgement of the right of freedom of speech.

In summary, the 1939 legislation had the following consequences relevant to this case:

(1) It made statutory the pre-existing restrictions imposed by Executive Order and Civil Service Rule on political activities of employees in the executive civil service.

(2) It extended the restriction on political management and campaigning from employees in the classified civil service to "any person employed in the executive branch of the Federal Government, or any

agency or department thereof," with a few specified exceptions. Section 9(a), 53 Stat. 1148.

(3) While Rule I had restricted employees to "private" expression of opinion on political subjects, Section 9(a) of the Hatch Act was so worded as to insure that public as well as private expressions of opinion would be protected. See 40 Ops. A. G. 14, 20–27.[1]

(4) By Section 9(b), Congress required the removal from office of any federal employee found to have violated the political activity prohibition. Previously, the sanction for such a violation had been discretionary, and lesser penalties than removal from office were usually imposed.[2]

When President Roosevelt signed the Hatch Act of 1939, he called attention to the fact that its prohibition against political activity by government employees applied only to employees of the federal government. He suggested that Congress at its next session study the feasibility of extending the provisions of the law to cover certain state and local government employees. See, generally Howard, *Federal Restrictions on the Political Activity of Government Employees*, 35 Am. Pol. Sci. Rev. 470, 480 (1941). In less than one year, Congress responded with a bill, in the form of amend-

[1] In 1940, this portion of Section 9(a) was amended to extend the area of permitted expression of opinion from "political subjects" to "political subjects and candidates." See 86 Cong. Rec. 2985.

[2] In 1950, Congress amended this provision to confer limited discretion on the Commission to impose a suspension of no less than 90 days in lieu of removal. 64 Stat. 475. In 1962, the minimum penalty was reduced to a 30-day suspension. 76 Stat. 750.

ments to the Hatch Act, which made most of the provisions of the 1939 Act applicable "to employees in the States whose employment is made possible by the use of Federal funds or appropriations from the Federal Treasury."[8] 86 Cong. Rec. 2338. Senator Hatch explained (86 Cong. Rec. 2338–2339):

> In approaching that task we have tried to follow as nearly as possible the exact language of the act we passed last year, which, in turn, was the exact language of the rule of the Civil Service Commission which has been in effect more than 50 years; and that language was originally chosen because it had been in effect in this country so long and was so thoroughly understood.

As originally introduced in the Senate, the 1940 amendments to the Hatch Act included a provision, Section 15, which directed the Civil Service Commission to promulgate rules or regulations defining the term "active part in political management or in political campaigns." According to the accompanying committee report (S. Rep. No. 1236, 76th Cong., 3d Sess., p. 4):

> After the promulgation of such rules or regulations, they will be controlling as to the meaning of such term when it is used in this act with respect to Federal employees as well as when it is used with respect to State and local employees. The Commission is authorized

[8] Among other things, the 1940 amendments to the Hatch Act, 54 Stat. 767–772, also granted to those covered by the law the right actively to participate in non-partisan elections and campaigns. See generally 5 U.S.C. 7326.

to amend such rules or regulations from time to time as it deems necessary.

Resistance to Section 15 was immediate, based primarily on the fear that such a grant of rule-making authority to the Commission would amount to an unconstitutional delegation of congressional power. See, *e.g.*, 86 Cong. Rec. 2928. In response to this criticism, Senator Hatch submitted a substitute which provided that the political activity prohibited by Section 9(a) of the original Act included only such activity as the Civil Service Commission had theretofore determined to be prohibited on the part of employees in the classified civil service. *Ibid.* After some debate on the amendment, Senator Hatch, indicating that he had "made a slight modification in it" (86 Cong. Rec. 2937), had the substitute measure read again. In its modified version, the amendment (with the modification emphasized) provided (*ibid.*):

> The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined *are at the time* of the passage of this act prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

Some of those who objected to Section 15 in its original form also argued against the substitute. They maintained that the substitute version incorporated into the Act a body of substantive law which had never been reviewed by the Senate. See, *e.g.*, 86 Cong. Rec. 2940, 2947–2949. In order to apprise the Senate of precisely what the Civil Service Commission had previously "determined [to be] * * * prohibited on the part of employees in the classified civil service," Senator Hatch introduced into the Record a section of the Commission's then-current political activity pamphlet, entitled "Particular Types of Prohibited Activities." This material contained a detailed discussion of the Commission's policies with regard to enforcement of the ban against political campaigning and management as it was being administered at the time. See 86 Cong. Rec. 2938–2940.

In addition, Senator Hatch circulated and had printed in the Record a card which contained a more succinct summary of specific political activities which the Commission had previously found unlawful under Civil Service Rule I, and which were then considered by the Commission to violate Rule I. 86 Cong. Rec. 2943.[4] Senator Hatch stated that "there is no question that they [the prohibitions listed on the summary card] cover the entire substance of the [Civil Service

[4] The summary listing of 18 principles which appeared on the card was not a regular publication of the Civil Service Commission; rather, it had been put together by Senator Hatch, with the Commission's assistance, for use in explaining the meaning of the prohibition adopted in Section 9(a) of the Hatch Act in 1939. 86 Cong. Rec. 2948.

Commission's] rules [against political activity]." 86 Cong. Rec. 2937. He further stated that "[u]nder that rule [Civil Service Rule I], which has been in existence for more than 50 years, the Civil Service Commission has made certain definite findings that this thing is political activity within the meaning of the rule, or that something else is not; and those are the interpretations which are included on this card." 86 Cong. Rec. 2948.

In response to these comments, the following colloquy between Senators Hatch and Brown took place (86 Cong. Rec. 2948):

> Mr. BROWN. Let me interrupt Senator. I ask the Senator if his substitute for section 15 relates to the interpretation of the rule [Civil Service Rule I]?
>
> Mr. HATCH. Yes.
>
> Mr. BROWN. Does it say so?
>
> Mr. HATCH. Yes; it says that the provisions of the act shall be deemed to prohibit the same activities on the part of the persons affected by it as the United States Civil Service Commission has heretofore determined are at the time of the passage of the act prohibited on the part of employees in the classified civil service, limiting it to that particular time.
>
> Mr. BROWN. Then, Mr. President, we not only are writing the rule into the statute——
>
> Mr. HATCH. But we are writing into the statute the interpretation of it.
>
> Mr. BROWN. But we are writing into the statute the interpretation of the Civil Service Commission.
>
> Mr. HATCH. Yes, exactly.

Thereafter, Senator Hatch clarified his answer to Senator Brown's last question by making it clear that the interpretations of Rule I which were incorporated into the statute were "the interpretations which appear on the card." 86 Cong. Rec. 2949.

The opponents of the legislation then suggested that it would be preferable for the Congress itself to define and specify the categories of prohibited conduct—for example, by taking the 18 statements on Senator Hatch's card and using them for the definition of political activity. See comments of Senator Brown at 86 Cong. Rec. 2949, 2951. The proponents of the bill expressed the view that, because the complex nature of the subject made it difficult to specify every type of conduct that would come within the intendment of the prohibition, and because the general concept, though difficult to define with comprehensive particularity, was clear enough in meaning and application to most situations, the approach of incorporation by reference of the principles developed by the Commission was preferable. Thus, Senator Barkley stated (86 Cong. Rec. 2952):

> * * * I will say to the Senator that, so far as I recall, Congress has never attempted in any of its civil-service laws to define what is pernicious political activity, for the situations are so variable, the facts are so different. Rarely, if ever, are the facts in two cases precisely alike. So I do not know how far Congress could go, or how wise it would be for Congress to define what is pernicious political activity. It is not like defining a utility or many other things which we do define by law. This is such a flexi-

ble term, depending on the facts in each case, that I believe Congress by undertaking to include certain things, might not include many other things which ought to be included, simply because of inability to think of all of them at once.

Senator George also defended the incorporation by reference approach (86 Cong. Rec. 2954):

Mr. BROWN. Now, let me read to the Senator what the Civil Service Commission said:

"Definition of political activity: It is impossible to give a complete list of the particular activities in which an employee may not engage."

Mr. GEORGE. Why, certainly it is, just as the courts throughout the ages have refused to define fraud, because they could not imagine every conceivable circumstance under which a practice would be fraudulent or in good faith. They knew very well that when they did define it, those who wanted to defraud would take advantage of the definition and get around it; so the courts have always said that no absolute, rigid, exhaustive, and exclusive definition of fraud could be made. They have put it upon the ground that all men might well understand—to wit, that the moment they defined fraud, the man who wanted to commit it would find his way around the definition.

Following this discussion, Senator Hatch's substitute version of Section 15 was passed (86 Cong. Rec. 2958), and, thereafter, the entire bill was approved by the Senate (86 Cong. Rec. 2987–2988). Section 15 was not disturbed by the House and appeared

in the enacted version of the bill in the form in which it passed the Senate. 54 Stat. 771.

When Title 5 of the United States Code was enacted into positive law in 1966 (see P. L. 89–554, 80 Stat. 378, 525), the language of Section 15 was somewhat revised. In its codified form, it provides (5 U.S.C. 7324(a)):

> For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

As can be seen, among other changes in the language, the words "before July 19, 1940" were substituted for the words "at the time this section takes effect." While the revised language in some part obscures the intent, which was plain on the face of the original version—namely, to adopt by reference only the then-current determinations of the Civil Service Commission—it is clear that Congress intended no substantive changes when it codified Title 5. As the Senate Report explained (S. Rep. No. 1380, 89th Cong., 2d Sess., pp. 20–21):

> Like other recent codifications which have been previously enacted into law and which will eventually result in the enactment of all 50 titles of the United States Code, *there are no substantive changes made by this bill enacting*

title 5 into law. It is sometimes feared or assumed that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation from which it can be inferred that a change of language is intended to change substance. The committee wishes to express that in a codification statute, however, courts uphold the contrary presumption: the statute is intended to remain substantively unchanged. [Emphasis added.]

2. Both prior and subsequent to the passage of the Hatch Act, the Civil Service Commission periodically published informational pamphlets which defined with particularity the proscriptions against political management and campaigning, as well as other restrictions on political activities of government employees. It was, in fact, a portion of the 1939 edition of the Commission's pamphlet on political activity (Form 1236) that Senator Hatch placed into the record during the debates on the 1940 amendments to the Act to explain the substantive prohibitions being incorporated into the Act by Section 15 (86 Cong. Rec. 2938–2940).

In 1970, the Commission promulgated regulations which specified in detail particular activities which the Act permits and which it prohibits. These specifications, which constitute a summary of the agency's interpretations of prohibited political activity contained in its pamphlets, are set forth in the Appendix,

infra, pp. 71–74. They list 13 specific kinds of activity in which an employee may engage and 13 types of activity which are prohibited. Among the permitted activities are such things are registering and voting, displaying a political picture, sticker, badge or button, attending a political gathering, or making a financial contribution to a political party or organization. Among the activities specifically prohibited are serving as an officer of a political party, soliciting or receiving contributions for partisan financial purposes, soliciting votes for or against a partisan candidate for public office or becoming a candidate, serving as a delegate to a political party convention, and driving voters to the polls on behalf of a partisan candidate.

As explained in theAppendix (*infra*, pp. 75–76), since the enactment of the Hatch Act the Commission has interpreted the prohibition against partisan political management and political campaigning consistently and in accordance with its decisions that were in effect in 1940 and that were consistent with the provisions of the Hatch Act itself.

3. Congress has made no significant changes in the Hatch Act since its enactment. In 1966, however, Congress established a Commission on Political Activity of Government Personnel, a bipartisan group which, after an extensive study, recommended liberalization of the political activity restrictions. Although a number of bills proposing such changes have been introduced, Congress has not acted. A summary of this recent legislative consideration of possible amend-

ment of the Hatch Act is set forth in the Appendix, *infra*, pp. 76–78.

B. THIS COURT'S DECISIONS UPHOLDING THE CONSTITUTIONALITY OF THE HATCH ACT

This Court upheld the constitutionality of the Hatch Act's restrictions on active political management and political campaigning in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (federal employees), and *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (state employees). In *Mitchell*, a number of individual federal employees and a labor union challenged the provision on the grounds that it violated their First, Fifth, Ninth, and Tenth Amendment rights by depriving them of freedom of speech and the right to engage in political activities, by unreasonably prohibiting them from carrying on activities lawfully permitted to others who were not government employees, by arbitrarily and unreasonably discriminating between covered and exempted federal employees, and because the prohibition was "so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful * * *." See 330 U.S. at 83, n. 12.

The Court first held that all but one of the plaintiffs failed to present an adjudicable case or controversy, because they had not actually engaged in prohibited activities and were not currently threatened with application of the sanctions of the Act. (*Id.* at 86–91). Since, however, one of the plaintiffs had in fact violated the restrictions and was facing discharge proceedings, the Court held that he presented a justi-

ciable controversy that could appropriately be resolved in the declaratory judgment proceeding (*id.* at 91–94). Considering his challenge, the Court upheld the constitutionality of the political management and campaigning restrictions. After reviewing prior cases in which similar constitutional challenges had been levelled against laws restricting political contributions,[5] the Court observed (*id.* at 98–100, 102–103):

> The provisions of § 9 of the Hatch Act and the Civil Service Rule I are not dissimilar in purpose from the statutes against political contributions of money. The prohibitions now under discussion are directed at political contributions of energy by government employees. These contributions, too, have a long background of disapproval. Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.
>
> Another Congress may determine that, on the whole, limitations on active political management by federal personnel are unwise. The teaching of experience has evidently led Congress to enact the Hatch Act provisions. To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system. Con-

[5] *Ex parte Curtis*, 106 U.S. 371; *United States* v. *Wurzbach*, 280 U.S. 396.

gress is not politically naive or regardless of public welfare or that of the employees. It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the Act.

The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible. Modern American politics involves organized political parties. Many classifications of government employees have been accustomed to work in politics—national, state and local—as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not overactive politically. [Footnotes omitted.]

* * * * *

We have said that Congress may regulate the political conduct of government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress.

> * * * Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

The Court also considered and rejected the contention that the restrictions, while perhaps constitutionally applicable to administrative and supervisory personnel, could not properly be applied to industrial personnel whose duties entail neither the making nor the execution of government policy (the plaintiff whose claim was under consideration was a roller in the Mint):

> * * * Nevertheless, if in free time (the employee) is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors. Congress may have thought that government employees are handy elements for leaders in political policy to use in building a political machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. There are hundreds of thousands of United States employees, with positions no more influential upon policy determination than that of Mr. Poole. Evidently what Congress

> feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation. [*Id.* at 101.]

Finally, the Court refused to reach the facial attack on the statute for vagueness, holding that the conduct in question in the particular case before it was clearly constitutionally sanctionable (*id.* at 103–104).[*]

Since the *Mitchell* and *Oklahoma* decisions, the courts have had numerous opportunities to review the provisions of the Hatch Act and the Commission's administration thereof. In only one case (*Wilson* v. *U.S. Civil Service, Commission,* 186 F. Supp. 104 (D.D.C.)), has the Commission's interpretation of what constitutes restricted political activity under the Act been questioned. In *Wilson,* the Commission had found that a federal employee who wrote a letter to a newspaper with the intent to have it published and to dissuade voters from supporting a particular partisan political candidate had participated in a political campaign. The court overturned the Commission's action, finding that, in view of the statute's specific guarantee of the right of expression of opinion on political subjects and candidates, an isolated letter

[*] Justices Black and Rutledge dissented on the ground that the Act was overbroad and vague (330 U.S. at 104, 105–115). Mr. Justice Douglas dissented in part, concluding that a justiciable controversy was presented by all the plaintiffs and that the Act was invalid as applied to non-administrative employees (*id.* at 115–126). In the *Oklahoma* case, the Court upheld the constitutionality of the Hatch Act as applied to State employees working in federally funded programs.

could not fairly be considered active participation in a political campaign.

While other courts have occasionally overturned Civil Service Commission political activity decisions on procedural grounds,[7] the Commission's interpretation of the content of the restriction has otherwise consistently been upheld, and constitutional challenges to the Act have been uniformly rejected prior to the decision of the district court in the instant case.[8]

II. THE DISTRICT COURT MISCONSTRUED THE HATCH ACT IN HOLDING IT UNCONSTITUTIONAL

The path taken by the district court in reaching the conclusion that the Hatch Act's political activity prohibitions are impermissibly vague and overbroad, and that these defects warrant striking the statute down on its face, was marked by fundamental errors of statutory construction and application, including the court's conclusion that Section 15 of the Act incorporated by reference all pre-1940 determinations of the Commission, its view that the Act contained irreconcilably conflicting rules, and its refusal to evaluate the statute as authoritatively construed by the

[7] *Flanagan* v. *Young*, 228 F. 2d 466 (C.A.D.C.); *Gray* v. *Macy*, 239 F. Supp. 658 (D. Ore.), reversed, 358 F. 2d 742 (C.A. 9).

[8] *E.g.*, *Northern Virginia Regional Park Authority* v. *U.S. Civil Service Commission*, 437 F. 2d 1346 (C.A. 4), certiorari denied, 403 U.S. 936; *Fishkin* v. *U.S. Civil Service Commission*, 309 F. Supp. 40 (N.D. Cal.), appeal dismissed as untimely, 396 U.S. 278; *Kearney* v. *Macy*, 409 F. 2d 847 (C.A. 9), certiorari denied, 397 U.S. 943; *Engelhardt* v. *U.S. Civil Service Commission*, 197 F. Supp. 806 (M.D. Ala.), affirmed *per curiam* 304 F. 2d 882 (C.A. 5).

Civil Service Commission and the courts. A proper construction of the statute in these respects undercuts the basis for the court's finding of unconstitutionality.

A. THE STATUTE WAS ERRONEOUSLY CONSTRUED TO INCORPORATE ALL PRE-1940 DECISIONS OF THE COMMISSION

The threshold question in construing Section 15 of the Hatch Act is to determine what it was that Congress incorporated by reference in the definition of proscribed political activities. The majority below, reading the statute literally, concluded that the determinations incorporated into the Act were the entire body of "over 3,000 rulings made by the Commission between 1886 and 1940" (J.S. App. A, p. 4a) with respect to acts of political management or political campaigning which were at some point during that period prohibited to employees in the competitive service. If one accepts the majority's interpretation of the statute, then there would be problems to consider, for the entire body of pre-1940 administrative determinations of the Commission, made over the course of more than 50 years, contained rulings which were, in some cases, inconsistent and outdated.

We submit, however, that it is clear from the legislative history of Section 15 that Congress never intended to incorporate the entire body of pre-1940 rulings. Rather, the intent was to incorporate only those rulings that continued to represent viable interpretations of the restriction as of 1940, and the Commission has been correct in its consistent administration of the Act in accordance with this understanding. This is, in fact, precisely what Congress

said when it passed Section 15; it defined the proscription to apply to such activities "as the United States Civil Service Commission has heretofore determined *are at the time this section takes effect* prohibited * * *." (54 Stat. 771; emphasis added.) It was only with the codification of Title 5 into positive law in 1966 that the provision, by referring for the first time to "acts of political management or political campaigning which were prohibited" under determinations made by the Commission "before July 19, 1940"* (5 U.S.C. 7324(a)), was revised in a manner admitting of the interpretation applied by the district court. The 1966 revision was not, however, intended to work any substantive change in the law; to conclude otherwise requires a holding that Congress intended, in the 1966 codification, to revive outdated pre-1940 decisions that were of no effect under Section 15 as enacted. No such conclusion is warranted. On the contrary, in enacting Title 5 into positive law Congress specified that "there are no substantive changes made by this bill" (S. Rep. No. 1380, 89th Cong., 2d Sess., p. 20). See p. 26, *supra*.

Indeed, it was not the decisions themselves that were the primary source of the incorporated definition of prohibited political activities, but rather the then-current interpretation of the concept by the Commission. See 40 Ops. A. G. 14, 24–27 (1941). Congress did not have before it the actual decisions; it did have

*The revision would have been more accurate had it used the words "and in effect on" instead of "before".

before it the interpretation of the principles they embodied. These were summarized on a card that had been prepared by Senator Hatch and was circulated during the debate on Section 15. 86 Cong. Rec. 2943. The card contained a listing of 18 specific categories of prohibited political management and campaigning, covering the major forms of political activity affected by the restriction, and representing a distillation of the concept as it had evolved under the Civil Service Commission's administration of its Rule I. Senator Hatch also introduced into the Congressional Record a somewhat more detailed exposition of the prohibition as construed at that time by the Commission, in the form of an excerpt from the Commission's contemporary political activities pamphlet (86 Cong. Rec. 2938–2940).[10] While this construction of the prohibition derived from the Commission's decisions in political activity cases, the debate makes clear that it was the interpretation of the Commission, as reflected in the materials adverted to by Senator Hatch, rather than the decisions themselves, that Congress intended to incorporate. See 86 Cong. Rec. 2948. The individual decisions, if still viable in 1940, continued to be relevant to the extent that they reflected particular applications of the general principles described in the interpretive materials before Congress.

[10] It appears that the excerpt from the Commission's pamphlet was not actually available to the Senators during the debate, but was printed in the Record after the passage of Section 15 by the Senate. Senator Hatch's card summarizing the restriction in 18 points was distributed, however, and its intent specifically discussed during the debate.

B. THE STATUTE IS NOT INTERNALLY INCONSISTENT

The court below was of the view that the Act was internally inconsistent—*i.e.*, that it prohibited through the incorporation provision the exercise of rights which were expressly conferred upon federal employees elsewhere in the Act (J.S. App. A, p. 6a). The dissent, however, correctly concluded that "[s]uch a construction is not tenable," since it would "create the absurdity that activities specifically exempted from the Hatch Act in Sections 9(a) and 18 were, at the same time, prohibited by Section 15" (J.S. App. A, p. 27a).

Under a familiar rule of statutory construction,[11] the specific provision of Section 18 (now 5 U.S.C. 7326), securing the right to participate actively in non-partisan elections and campaigns, prevails over the general provisions of Section 15 (now 5 U.S.C. 7324(a)(2)), which was enacted at the same time. With respect to the specific provision of the third sentence of Section 9(a) of the original Hatch Act (now 5 U.S.C. 7324 (b)), securing to federal employees the right to express political opinions, the legislative history shows that Congress did not intend in Section 15 to incorporate those prior rulings which prohibited public expression of political opinions. See 86 Cong. Rec. 2870; 40 Ops. A. G. 14, 20-27 (1941).

This Court was aware during the *Mitchell* litigation that the Commission's pre-1940 rulings prohibited both non-partisan political activities and the public

[11] See *e.g.*, *MacEvoy* v. *United States*, 322 U.S. 102, 107; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208.

expression, *simpliciter*, of political opinions. See, *e.g.*, 330 U.S. at 100. Nevertheless, the Court apparently had no difficulty reading into the statute through Section 15 only so much of the Commission's pre-1940 body of law as was consistent with the express provisions of the Act. For, as the Court stated (*ibid.*):

> It is only *partisan* political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, *public or private*, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success. [Emphasis added.]

While a statute which expressly confers rights in one section, only to take them away in another, would present serious questions concerning validity on vagueness grounds, the Hatch Act does not suffer from that infirmity. Neither this Court in *Mitchell*, nor the Civil Service Commission, which in its regulations emphasizes those employee rights not circumscribed by the Act, has given the Act such a construction.

By construing the Act so that outdated determinations by the Commission and determinations inconsistent with the Act's express authorization of participation in non-partisan political activities and public expression of views on political subjects and candidates are not incorporated by Section 15, most of the problems of uncertainty perceived by the district court evaporate. Of the 16 examples culled by the court from the Commission's pre-1940 decisions to

illustrate the "sweep and indefiniteness" of the rulings and their indefensibility as "against the strictures of the First Amendment" (J.S. App. A, p. 4a), all but three manifestly involve no Hatch Act violations.[12] With respect to those three items (publishing a political article (#8); allowing one's name to be associated with a political affair (#15); and being the author of an anonymous political communication (#16)), their status as prohibited political activities would turn on the particular facts surrounding the activity, and the applicability or inapplicability of the campaigning and management prohibition would clearly emerge from the facts in most instances.[13]

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[12] Most of the items listed by the court (*i.e.*, ##2–7 and 9–14) represent at most public expressions of opinion of the sort expressly protected in Section 9(a) of the Hatch Act (now 5 U.S.C. 7324(b)), particularly in light of the liberal construction afforded the language protecting such expressions in *Wilson* v. *United States Civil Service Commission*, 136 F. Supp. 104 (D.D.C.), the principles of which are today followed by the Commission (see Mondello affidavit, App. 56). Wagering on an election (#1), is viewed by the Commission as not being partisan activity, and therefore not prohibited by the Hatch Act, and some of the other 16 items might also fall within the exception for non-partisan political activity (*e.g.*, #13).

[13] For example, a federal employee who writes a flyer urging the election of a partisan candidate, knowing that the flyer is to be given mass distribution as part of the candidate's campaign literature, would violate the restriction, since this would be a clear case of political campaigning going beyond expression of opinion on a political subject. On the other hand, a letter to the editor of a newspaper would be permitted expression of opinion.

C. THE DISTRICT COURT ERRED IN FAILING TO GIVE EFFECT TO THE CIVIL SERVICE COMMISSION'S CONSTRUCTION OF THE STATUTE.

If all that an employee of ordinary intelligence could look to in order to ascertain what conduct Congress prohibited in the Act were a compilation of pre-1940 administrative rulings,[14] the statute might be vague and imprecise—though it may be observed that one who needs to know the law in many fields must depend ultimately on what is found in hundreds of volumes of this Court's reports. But those covered by the Hatch Act are not now, and never have been, required to interpret this mass of pre-1940 administrative materials themselves in order to ascertain what the Act prohibits. Rather, since the Hatch Act was enacted in 1939 (and for some period prior thereto), the Civil Service Commission has periodically published pamphlets and other documents defining with particularity the conduct prohibited by the Act.

Two of the earliest such publications under the Act—the 1939, and 1944 versions of a pamphlet entitled "Political Activity and Political Assessments of Federal Officeholders and Employees" were—before this Court as part of the record in *United Public Workers* v. *Mitchell*, No. 20, O. T., 1946.[15] In this Court's deci-

[14] Pursuant to respondents' request, we have lodged with the Clerk ten additional sets of the three-volume compilation of pre-1940 Civil Service Commission rulings, which is part of the record on appeal.

[15] The 1944 pamphlet and portions of the 1939 pamphlet were reproduced in the "Transcript of Record" filed in *Mitchell*, commencing, respectively, at pages 36 and 71.

sion in *Mitchell*, there are several references to these documents, which make it clear that the Court then deemed it proper to rely upon the Commission's published interpretations of the pre-1940 rulings to ascertain the meaning of Section 15. See, *e.g.*, 330 U.S. at 100, n. 36. Moreover, Congress itself relied upon the Civil Service Commission's interpretation of the pre-1940 rulings, as summarized, ~~and~~ on the card circulated by Senator Hatch, not the rulings themselves, when it enacted Section 15. See pp. 36–37, *supra*.

In testing whether a statute is unconstitutionally vague or overbroad, this Court will examine whether it has been "authoritatively construed" so that a "'satisfactory limiting construction'" is placed on the statutory language. *Gooding* v. *Wilson*, 405 U.S. 518, 520–521. See also, *e.g.*, *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, 162–163 (administrative construction); *United States* v. *Harriss*, 347 U.S. 612 (construction by this Court). Compare *Cox* v. *Louisiana*, 379 U.S. 536, 555–558; *Edwards* v. *South Carolina*, 372 U.S. 229; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 608–609; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147. This rule is particularly applicable here, where the Act incorporates by reference a pre-existing administrative construction. Cf. *United States* v. *Sharpnack*, 355 U.S. 286. Where such a construction has been provided by the officers or agency charged with administration of the statute, it will be accorded "great deference" by the courts. *Udall* v. *Tallman*, 380

U.S. 1, 16; *Perkins* v. *Matthews*, 400 U.S. 379, 391; see also *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *United States* v. *City of Chicago*, 400 U.S. 8, 10.

The district court considered itself free to ignore the foregoing precepts and to disregard the Commission's regulations and other post-enactment interpretations of the political management and campaigning restriction. It did so because of its conclusion that Congress had expressly denied the Commission authority "to create essential clarity out of the general, imprecise prohibition enacted" (J.S. App. A, p. 9a). This conclusion misinterprets what Congress did. The original version of Section 15 reported out of the Senate committee would have conferred rule-making authority on the Commission in defining prohibited acts of political management and campaigning, but when opponents of the Hatch Act challenged this rule-making provision as an unconstitutional delegation of legislative power to the Commission, the incorporation-by-reference approach was substituted. See pp. 20–21, *supra*. All that this signified, however, was a congressional unwillingness to give the Commission a free hand to redefine, and possibly to expand, the scope of the prohibition (see, *e.g.*, 86 Cong. Rec. 2928); instead, Congress chose to establish the definitional standard itself, basing it upon the Commission's contemporary interpretation of prohibited political management and campaigning.

The fact that Congress itself set the standard for prohibited conduct by reference to Commission rulings does not indicate that Congress expected the Commis-

sion to cease publishing its summaries of prohibited political activities, or that those covered by the Hatch Act could not look to such publications for a definitive statement of their obligations and responsibilities under the Act. Indeed, that Congress expected reliance on the Commission's interpretation is confirmed by the fact that Congress relied upon these same materials when it enacted Section 15.

At all events, as the agency charged with the ultimate responsibility for enforcing the Hatch Act's ban on political activity, the Commission necessarily has authority to interpret the statute and to proceed on the basis of those views until the courts reject them. As one court has observed:

> "In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authorization to do so. * * *"

American President Lines, Ltd. v. *Federal Maritime Commission,* 316 F. 2d 419, 422, n. 5 (C.A.D.C.), quoting from *Report of the Attorney General's Committee on Administrative Procedure,* pp. 99–100 (1941). See generally *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140; 1 Davis, *Administrative Law Treatise* 302 (1958).

The district court should, therefore, have evaluated the claims of vagueness and overbreadth against the statutory prohibition as construed in the post-enactment decisions and regulations of the Civil Service Commission.

III. THE HATCH ACT, PROPERLY CONSTRUED, IS NOT UNCONSTITUTIONALLY VAGUE

The purpose of the constitutional doctrine of vagueness—upon which the court below relied as one of the grounds for invalidating the Hatch Act—is to place governmental regulation of First Amendment activities within legitimate bounds by requiring a clear statement of the prohibitions the statute imposes.[18] This particularization of governmental power, whether accomplished in the drafting of the statute or through subsequent judicial or administrative interpretations, serves several important interests. These interests recently were summarized in *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–109:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reason-

[18] In one sense, any inhibitory statute which incorporates by reference a specific body of extant law (whether in the form of administrative rulings, judicial decisions, or other statutes), is facially vague and imprecise. This, however, does not make the statute constitutionally infirm, since the statute is to be read in connection with the material which it incorporates—here, the Civil Service Commission's interpretations of the political management and campaigning restriction, reflected in its pre-1940 rulings. Thus, in *United States* v. *Sharpnack*, 355 U.S. 286, 293, which involved a challenge on constitutional grounds to the Assimilative Crimes Act of 1948, 18 U.S.C. 13, this Court pointed out that "[w]hether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves."

able opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' * * * than if the boundaries of the forbidden areas were clearly marked." [Footnotes omitted.]

As we now show, the "important values" which the vagueness doctrine is designed to safeguard are also preserved here. More specifically, the ban against political activity contained in the Hatch Act has been construed by the Civil Service Commission in a manner giving "the person of ordinary intelligence a reasonable opportunity to know what is prohibited;" the Act provides the Civil Service Commission with "explicit standards" for enforcement; and the Act does not have an impermissible inhibitory effect on the exercise of First Amendment rights because of vagueness.

a. The Hatch Act, as construed by the Commission gives fair notice of what it prohibits. The Commis

sion's present regulations interpreting the statutory prohibition, which the court below ignored, explicitly list 13 permissible activities and 13 prohibited activities (see App., *infra*, pp. 71–74). These listings encompass most of the common forms of political activity in which government employees are likely to consider engaging and thereby provide accurate and effective notice of the principal applications of the prohibition.[17] It is clear from this Court's past treatment of vaguéness issues that its principal concerns are pragmatic—is the statute in fact so drafted, construed, and applied that it presents a substantial actual danger of impeding lawful engagement in First Amendment activities? The district court erred in ignoring the role played by the regulations in giving meaningful and effective content and limits to the political activities prohibition.

Of course, the listing of prohibited activities in Section 733.122 (5 C.F.R.) of the Commission's regulations is not a complete catalogue of all conduct that could come within the Hatch Act's prohibition against partisan political management or campaigning. Partisan politics in the United States is composed of a complex and multi-faceted variety of activities; moreover, the concept and scope of political activity changes with the passage of time and the growth and development of

[17] The Commission does not rely on the existence of the regulations as the sole means of communicating the contents of the prohibition to interested government employees. It has an active program of information through widespread distribution of brochures, leaflets, and posters that explain the restriction in simple and comprehensible language.

our political institutions. Given the lawfulness of the prophylactic principle underlying the Hatch Act (the substantive constitutionality of which is not material to the vagueness inquiry), it is unreasonable and unnecessary to demand a precisely stated list of all proscribed activities.

The district court was troubled by the difficulty of drawing a precise line between permitted expression of opinion and prohibited campaigning (J.S. App. A, pp. 8a–9a). There are, concededly, borderline cases in which it may be difficult to determine whether the activity falls within the proscription. This is, however, an inherent characteristic of the subject matter rather than the product of any defect of vagueness in delimitation of the proscription. For example, a government employee at a social gathering can freely express his political opinions to others present; on the other hand, if a series of such gatherings is arranged for the purpose of informing those in attendance of the merits of a partisan candidate, and the employee attends each for the purpose of speaking on behalf of the candidate, a clear case of prohibited campaigning would be made out. The precise point at which permitted expression of views crosses the boundary into prohibited campaigning can hardly be described in advance in a manner covering every intermediate factual situation; yet, knowing the facts of a specific case, the applicability of the prohibition to the conduct will usually clearly emerge.[18]

[18] Congress specifically considered and rejected the possibility of trying to list specific restrictions itself, preferring the incorporation-by-reference approach. See pp. 24–25, *supra*.

While it may be appropriate to resolve borderline cases in favor of the employee under an expansive reading of the statutory provision protecting the employee's right to express his views—as was done in *Wilson* v. *United States Civil Service Commission, supra*—it is inappropriate to invalidate the statute on its face because it deals with a subject matter that does not admit of precise line-drawing covering all imaginable contingencies. As the Court pointed out in *United States* v. *National Dairy Products Corporation*, 372 U.S. 29, 32, "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." See also *United States* v. *Harriss*, 347 U.S. 612.

The Commission has gone further than issuance of descriptive regulations and circulation of explanatory literature in providing means for ascertaining the contents of the prohibition. Should a particular employee contemplate political action that is not expressly covered in either of the listings set forth in the regulations, he may obtain an advisory opinion from the Civil Service Commission's Office of General Counsel as to the applicability of the Hatch Act to his action.[19] While the presence of such a procedure is not necessary to establish the facial constitutionality of the

[19] According to the General Counsel's affidavit (App. 54):

"The Information Unit [in the Office of General Counsel] answers inquiries, from whatever source, concerning the application of the Hatch Act, Rule, and regulations. It is estimated that some five hundred written requests for political activity opinions are received annually. It is further estimated

statute, its availability diminishes substantially any vice of uncertainty that may remain with respect to interstitial situations not clearly covered by the Commission's interpretive regulations. The advisory opinion procedure thus helps to satisfy the interest in fair warning which the vagueness doctrine is designed to assure. Cf. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 49.

b. The provisions of the Hatch Act, through the statutory language and as authoritatively construed by this Court, do provide "explicit standards for those who apply them." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108. Certain fundamental principles are declared by the statute: an employee "retains the right to vote as he chooses and to express his opinion on political subjects and candidates" (5 U.S.C. 7324(b)); additionally, non-partisan political activity is expressly allowed (5 U.S.C. 7326). See *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 99, 100. Further, "[i]n order to give the Civil Service Commission adequate standards to measure active participation in political activities" (*Oklahoma* v. *Civil Service Commission*, *supra*, 330 U.S. at 144), Congress in Section 15 ordered that the phrase, "active part in political management or in political campaigns" be defined in terms of the Commmission's interpretation of the prohibition in

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that telephone requests for information account for another four hundred informal opinions each year."

See App. 58–68, the several advisory opinions which were annexed to the General Counsel's affidavit for purposes of illustration.

1940. Indeed, the rejection of the original Senate Committe version of Section 15, under which the Commission would have had rule-making power to define prohibited political activities, was motivated by a congressional desire to limit the Commission's discretion in applying the prohibition. See pp. 20–21, *supra*.

Moreover, the Commission, by publishing regulations which give its interpretation of the statute, has imposed standards upon itself from which it is not free to deviate in particular cases. Cf. *Vitarelli* v. *Seaton*, 359 U.S. 535, 539.

The kind of "uncontrolled discretion" of a policeman on the beat or prosecutor that troubled the Court in such cases as *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, *Coates* v. *City of Cincinnati*, 402 U.S. 611, and *Staub* v. *City of Baxley*, 355 U.S. 313, 322, thus is not present in the administration of the Hatch Act. On the contrary, the Commission must be and is guided by a substantial body of its own precedents and regulations. That their application to a particular factual situation may be uncertain from time to time in no way differentiates the administration of the Hatch Act from that of countless other laws and regulations that courts and agencies daily interpret and apply. This common characteristic of the legal process, requiring the application of general principles and precedents to specific factual circumstances, does not give rise to the kinds of opportunities for administrative abuse that would warrant facial invalidation of the statute for vagueness.

c. The third principle of the vagueness doctrine, as summarized by this Court in *Grayned, supra,* is that "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] fredoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" * * * than if the boundaries of the forbidden areas were clearly marked.' " 408 U.S. at 109. As previously mentioned, the Civil Service Commission's published regulations authoritatively construe the language of the Hatch Act and give employees substantial notice of what constitutes proscribed conduct, covering all of the most common types of prohibited activities.

To avoid inhibiting employees in the exercise of their First Amendment rights, the Commission, at 5 C.F.R. 733.111, has also specifically listed those common political activities in which federal employees may engage. Further, if an employee is in doubt whether contemplated activity is prohibited, he may obtain an advisory ruling from the Commission.

The potential for uncertainty is thus minimized and confined to a relatively few uncommon or borderline situations. It is the nature of the subject matter itself that makes greater precision practically unattainable. Once one accepts as constitutional the congressional decision to preserve the political neutrality of the civil service by means of a prophylactic prohibition against active, partisan political campaigning, the manner in which the prohibition has been described and implemented in the administration of the

Hatch Act, within the limitations inherent in the subject matter, satisfies the requirement of specificity.

Finally, with regard to the problem of vagueness, we believe the district court erred in approaching the matter from an abstract and theoretical standpoint rather than through a consideration of the real situation of the government employee seeking to engage in political activities. Suppose Congress were to enact the Civil Service Commission regulations as the definition of prohibited political activities. Would that cure the vagueness problem? The opinion below sheds little light on that question, since the district court considered the statutory language without resort to or analysis of the interpretive regulations. We suggest that such a statute would not be unconstitutionally vague; we further suggest that the enactment of such a statute would have no practical impact upon the application of the principles underlying the vagueness doctrine, since government employees would have the same guidance regarding permitted and prohibited activities that they now enjoy.

The vagueness issue should have been determined with reference to the regulations and other materials and procedures available to guide employees in their political activities. So considered, the prohibition is not unconstitutionally vague.

IV. THE HATCH ACT, PROPERLY CONSTRUED, IS NOT OVERBROAD

Closely related to the vagueness doctrine is the doctrine of "overbreadth," which the court below also

relied upon in striking down the Hatch Act. For the most part, our arguments that the Act is not unduly vague answer the overbreadth challenge as well.

The doctrines of vagueness and overbreadth have both been used by this Court to invalidate statutes which deter the exercise of conduct that the First Amendment protects. See, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611; *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *N.A.A.C.P.* v. *Button*, 371 U.S. 415.

An overbroad statute is one which covers some activity that may constitutionally be regulated as well as some that may not be. In many cases, the latter conduct is covered not because the legislature intended to reach such activity, but because the prohibitions are couched in general or generic terms. Where this is the case, an authoritative narrowing construction which excludes constitutionally protected conduct from coverage will save the statute from facial invalidation. See, *e.g.*, *Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Rumley*, 345 U.S. 41; cf. *Younger* v. *Harris*, 401 U.S. 37, 50–51. In the instant case, no "narrowing" construction is required to save the statute—merely a construction that fairly reflects the congressional intent.

We have shown above that the Civil Service Commission regulations have clarified Section 15 to a degree that a covered employee of ordinary intelligence is unlikely to be deterred from exercising his First Amendment rights because of uncertainty. To

be sure, the fact that a statute is not vague does not necessarily mean it is not overbroad. Indeed, this Court recently pointed out that "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford,* 408 U.S. 104, 114. Here, however, the Commission's interpretative regulations have not only made Section 15 "clear and precise," but they have also removed any overbreadth that might have inhered in the statute in its uninterpreted form.

This is because the vice of overbreadth normally arises when the effective provisions of a statute are couched in broad generic terms that literally encompass privileged activity along with conduct that can be regulated. Such statutes, if they have not been or cannot be narrowly construed, may be invalidated in order to put an end to their tendency to suppress constitutionally protected rights. See, *e.g., Coates* v. *City of Cincinnati,* 402 U.S. 611. But the Hatch Act, as construed by the Commission, does not establish a singular prohibition, generically described, which, although it might be definitive enough to avoid invalidation on vagueness grounds, sweeps so broadly that it may include activity not amenable to regulation. Rather, the Commission has refrained from an all-encompassing description of prohibited activity, and, instead, has explained what the Hatch Act prohibits by listing specific prohibited acts. By particularizing the pro-

hibition in this manner, the Commission has eliminated any possible overbreadth in the Act as a whole.

The court below did not independently analyze the overbreadth issue; instead, it linked the concept with that of vagueness, alluding to "sweep and indefiniteness" (J.S. App. A, p. 4a) or "overbreadth and attendant vagueness" (*id.* at 11a). The perceived overbreadth could theoretically reside in the Act's incorporation of outdated pre-1940 decisions that were not adopted by Congress, and are not in fact being applied by the Commission in its administration of the political activity prohibition. Or it could be found i nthe Act's application, as administratively construed, to activities which the court thought could not constitutionally be proscribed. The opinion suggests that the overbreadth finding was predicated upon the former supposed defect, since it speaks of "rigidly incorporated prior rulings" (*id.* at 9a) and utilizes illustrations that, by and large, are outside the scope of the prohibition as intended by Congress and as administered by the Commission (*id.* at 5a; see pp. 39–40, *supra*).

The Act is not overbroad by virtue of incorporation of pre-1940 rulings prohibiting activities that would today be considered beyond the constitutional power of Congress to forbid. As we have previously indicated, this argument is premised upon an erroneous construction of the statute, which was intended not to effect a "rigid incorporation" of all pre-1940 determinations by the Commission, but rather to incorporate the Commission's contemporaneous interpretation,

further modified by the guarantee of the right to public expression of opinion on political subjects and candidates and to participation in non-partisan elections. See Part II, *supra*, pp. 34–44. Thus, those prior rulings that appear to infringe "the constitutional right to state opinion" (J.S. App. A, p. 9a) should properly have been held not to have been incorporated in the definition of prohibited political activities; they provide no basis for a finding that the Hatch Act is overbroad.

There remains the question whether the statute as properly construed nevertheless contains substantial unconstitutional restraints upon the exercise of First Amendment rights by government employees. This question, which concerns the "substantive" issue of congressional power to adopt prophylactic measures against partisan political activity by government employees rather than the "procedural" issue of the constitutional adequacy of the prohibition as drafted and applied, was not litigated in or reached by the district court. It should not be considered here. See Part VI, *infra*.

V. THE DISTRICT COURT ERRED IN STRIKING THE STATUTE DOWN ON ITS FACE

Even if there were some valid basis for concern about the constitutionality of the Hatch Act's restrictions against political management and campaigning in some particulars, it does not follow that the proper remedy is facial invalidation, which results in

a wholesale elimination of much that is clearly valid and necessary to the maintnance of an impartial federal civil service. As we have argued above, the statute is not, properly construed, constitutionally infirm; but, in any event, the drastic remedy of facial invalidation is not an appropriate judicial response to any defects that may be perceived, since less drastic means are available and appropriate to avoid unconstitutional applications of the prohibitions or impermissible inhibitory effects on protected First Amendment activities.

To some extent, resolution of the question turns on technical considerations. Is there a feasible way to eliminate or excise the constitutionally objectionable aspects of the statute without so eviscerating it that it ceases to serve the legitimate objectives that motivated its enactment? In this case, the statute as construed is made up of a series of discrete, self-contained prohibitions, each of which is effectively severable from the others. Thus facial invalidation is unnecessary, and if there are objectionable provisions, a narrower process of excision is to be preferred. See *United States* v. *Jackson,* 390 U.S. 570, 585–586. In other words, if, for example, the restriction on circulating a partisan nominating petition (Section 122(b)(13), 5 C.F.R. 733, of the Commission's political activity regulations) or on soliciting votes in support of a partisan candidate (Section 122(b)(7)) were viewed as invalid, it is unnecessary to the fostering of protected

First Amendment rights simultaneously to strike down other, permissible restrictions such as those against serving as an officer of a political party (Section 122 (b)(1)), soliciting or receiving contributions for a partisan political purpose (Section 122(b)(3)), or becoming a partisan candidate for elective public office (Section 122(b)(6)).

Congress has indicated its intention to preserve valid portions of the legislation in the event of partial invalidation. When enacted in 1939, the Hatch Act provided, in Section 11 (53 Stat. 1149):

> If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

This provision was originally codified at 18 U.S.C. (1940 ed.) 61k. However, when Title 18 was enacted into positive law in 1948, the severability provision was repealed as unnecessary. See Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862. This apparently occurred because the various provisions of the Hatch Act were scattered at different locations in Titles 5 and 18, which made the severability provision awkward. But the congressional intent reflected by the provision should be respected.

The question of the propriety of facial invalidation should also be considered against the background of

the importance of the governmental interests that the Hatch Act serves and the nature of the restrictions that it imposes upon First Amendment activities. Here, Congress has not adopted a blanket prohibition on political activity and expression. The right to vote and the right to express opinions on all political subjects and candidates has been carefully preserved. The scope of the restrictions has been further tailored to the perceived necessities of the problem by allowing full participation in a broad range of non-partisan political matters.

The restrictions that Congress did impose were deemed necessary to serve vital governmental objectives in maintaining an efficient and impartial civil service. Furthermore, the restrictions themselves foster significant First Amendment values by protecting the democratic political process from the potential evil of a civil service mobilized in support of partisan political goals and by protecting the individual civil servant from direct or subtle coercion to engage in unwanted political activity. Where legislation or regulation imposing some restrictions upon First Amendment activities is reasonably related to the accomplishment of such important and meritorious objectives, facial invalidation is ordinarily not used as a remedy for constitutional defects that may arise from the regulatory scheme. Compare *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 395–396, and *National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575, 620, with *Coates* v.

City of Cincinnati, 402 U.S. 611, and *United States* v. *Robel*, 389 U.S. 258.

VI. *MITCHELL'S* HOLDING THAT CONGRESS MAY CONSTITUTIONALLY PROHIBIT ACTIVE, PARTISAN CAMPAIGNING BY GOVERNMENT EMPLOYEES SHOULD NOT BE RECONSIDERED IN THIS CASE

The complaint in this proceeding can arguably be read to have challenged not only the alleged vagueness and overbreadth of the Hatch Act's restrictions on partisan political management and campaigning, but also the underlying constitutionality of the restrictions themselves (see paragraph 27c of the complaint, App. 11). However, the parties did not litigate the merits of the political activity restrictions as interpreted and applied by the Civil Service Commission, and the district court confined its decision to the facial validity of the statute. In fact, the court below explicitly recognized the "appropriateness" of the governmental objective to prevent government employees from taking an active part in poltical management and campaigning (J.S. App. A, p. 3a).

The basic question was decided in *Mitchell*. That case has become a part of the fabric of our constitutional law. There is no occasion for re-examining that decision. If there are matters of detail which were not decided in the *Mitchell* case, if there are particular portions of the Commission's regulations or particular applications of the prohibition which raise undecided questions, those matters are best left to resolution on a case by case basis in the context of specific alleged violations. Cf. *Laird* v. *Tatum*, 408 U.S. 1.

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed and the complaint dismissed.

Respectfully submitted.

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APPENDIX

Regulation of Political Activities of Federal Government Employees

A. REGULATION PRIOR TO THE HATCH ACT

The principle of merit in public employment, which underlies the Hatch Act,[1] emerged early in our history and was given expression by several of our early Presidents, who strived for the establishment and preservation of a federal civil service system based upon merit. At the same time, however, forces existed that made it difficult, and at times impossible, to maintain a truly impartial, non-partisan civil service. See generally Kaplan, *The Law of Civil Service* 1–29 (1958); Friedman and Klinger, *The Hatch Act: Regulation by Administrative Action of Political Activities of Government Employees*—I, 7 Fed. Bar J. 5 (1945); Howard (*Federal Restrictions on the Political Activity of Government Employees*, 35 Am. Pol. Sci. Rev. 470 (1941).

Thus, even while George Washington "banned nepotism, and denied employment to veterans of the Revolution if they were not qualified for the positions they sought" (*Kaplan, op. cit. supra,* p. 1), he

[1] The Hatch Act, formally known as "An Act to Prevent Pernicious Political Activity," was originally enacted on August 2, 1939, ch. 410, 53 Stat. 1147–1149, and was amended on July 19, 1940, ch. 640, 54 Stat. 767–772. Various provisions of the Act have since been codified in Title 18 and Title 5 of the United States Code (the latter including all provisions under consideration in this case).

stressed geographical distribution in appointmer
and relied heavily upon Congressional recommend
tions in making his appointments. Both practices p
sisted beyond Washington's incumbency and, wh
seemingly innocuous, provided a basis for what w
essentially appointment on a political patronage ba
(*id.* at 2).

Complementing such general practices was the p
sage in 1820 of the Four Year Tenure of Office A
which provided that the terms of many officials we
to be for four years, at the end of which time th
were to turn in their accounts. "Though ostensibly
fiscal measure, it soon became an excuse for who
sale removal of incumbents, whether or not th
accounts were in order or whether or not they h
any accounts to submit." *Id.* at 3. Not surprising
"[t]his act, with the doctrine of rotation in off
* * *, became the cornerstone of the spoils syst
which reached its apex in the mid-19th centur
(*ibid.*).

At the same time, however, the spoils system w
perceived by most as an obstacle to good governme
for a number of reasons, including the fact that th
who were appointed on a patronage basis were oft
inefficient or even wholly incompetent. Beyond th
however, the spoils system was damaging becau
those who achieved office under it often had partis
allegiences which were more strongly felt than w
their responsibilities as public servants. This,
course, created the danger that such employees mi
subordinate the public's interest to that of the par
As one measure to guard against this possibility,
strictions in various forms have been traditiona
imposed upon the political activities of employees
the executive branch of the federal government.
generally Friedman and Klinger, *The Hatch A*

Regulation by Administrative Action of Political Activities of Governmental Employees, supra, at 6–8.

As early as 1801, the heads of the executive departments, at the direction of President Jefferson, issued an order stating:

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments. * ,* * [I]t is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. This I am instructed, therefore, to notify to all officers within my Department holding their appointments under the authority of the President directly, and to desire them to notify to all subordinate to them. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it. [10 Richardson, *Messages and Papers of the Presidents* 98–99 (1899); Congressional Globe, 25th Cong., 3d Sess., Vol. 7, Appendix, p. 405, 86 Cong. Rec. 2433–2434.]

Forty years later, Secretary of State Daniel Webster issued the following order to department heads at the direction of President William Henry Harrison:

> SIR: The President is of opinion that it is a great abuse to bring the patronage of the General Government into conflict with the freedom of elections, and that this abuse ought to be corrected wherever it may have been permitted to exist, and to be prevented for the future.

He therefore directs that information be given to all officers and agents in your department of the public service that partisan interference in popular elections, whether of State officers or officers of this Government, and for whomsoever or against whomsoever it may be exercised, or the payment of any contribution or assessment on salaries, or official compensation for party or election purposes, will be regarded by him as cause of removal.

It is not intended that any officer shall be restrained in the free and proper expression and maintenance of his opinions respecting public men or public measures, or in the exercise to the fullest degree of the constitutional right of suffrage. But persons employed under the Government and paid for their services out of the public Treasury are not expected to take an active or officious part in attempts to influence the minds or votes of others, such conduct being deemed inconsistent with the spirit of the Constitution and the duties of public agents acting under it; * * *. [4 Richardson, *Messages and Papers of the Presidents* 52 (1897).]

Again, on June 22, 1877, President Hayes promulgated the following rule "applicable to every department of the civil service": [2]

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[2] By the Act of March 3 1871, ch. 14, § 9, 16 Stat. 514, Congress authoried the President to prescribe regulations for the creation of a civil service of federal employees. That law, which has been codified and remains in effect today, provides (5 U.S.C. 3301):

"The President may—

"(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

"(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

"(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section."

No officer should be required or permitted to take part in the management of political organizations, caucuses, conventions, or election campaigns. Their right to vote and to express their views on public questions, either orally or through the press, is not denied, provided it does not interfere with the discharge of their official duties. No assessment for political purposes on officers or subordinates should be allowed. [7 Richardson, *Messages and Papers of the Presidents* 450–451 (1898).]

This general problem, which had long been the con-
ern of Presidents, was dealt with by Congress for
he first time in the Civil Service Act of 1883, ch. 27, 22
tat. 403.[3] The Act created the Civil Service Commis-
on as the agency to administer the civil service un-
r the President. The Act also declared that "no
rson in the public service is for that reason under
y obligations * * * to render any political service,"
d does not have "any right to use his official au-
rity or influence to coerce the political action of any
rson or body." 22 Stat. 404.

The Act empowered the President to promulgate
les for carrying this act into effect." Pursuant to
authority, and that contained in the Act of March 3,
, President Arthur, on May 7, 1883, promul-
d the original Civil Service Rules. As then pro-
gated, the rules contained no specific prohibition
nst participation by federal employees in politi-
campaigns. Rather, they merely restated the lan-
e of the Act, providing in Rule I that "[n]o

[3] Between 1865 and 1880, both congressional and public out-
over patronage practices began to mount. This agitation
form culminated in 1883 with the passage of the Civil
e Act, commonly referred to as the Pendleton Act. See
n, *op. cit. supra*, pp. 9–10.

person in [the executive civil] service shall use his official authority or influence either to coerce the political action of any person or body or interfere with any election." 8 Richardson, *Messages and Papers of the Presidents* 161 (1898). Thereafter, on July 14, 1886, President Cleveland issued an executive order in which he warned federal employees "against the use of their official positions in attempts to control political movements in their localities." *Id.* at 494–495. Nonetheless, as one writer has explained, President Cleveland's directive was not effective in abating federal employee participation in political activities:[4]

> Because of the fact that the order was enforceable by department heads rather than by the Civil Service Commission, there was no uniformity in its application.

In 1907, President Theodore Roosevelt issued Executive Order No. 642, which provided in part as follows:

> No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns [Twenty-fourth Annual Report of the Civil Service Commission, p. 104 (1907).]

The language of this order was promptly incorporated into Civil Service Rule I, which continued in effect without change until the passage of the Hatch Act in 1939.

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[4] *Howard, supra*, 35 Am. Pol. Sci. Rev. at 474.

The reasons for this amendment were set forth in the 24th Annual Report of the Civil Service Commission (pp. 7–8):

> The operation of the civil-service law in substituting a merit for a party test in appointments has greatly lessened abuses arising from the partisan activity of officeholders. This, however, while correcting the abuse of partisan activity in obtaining office, did not entirely correct the abuse of such activity of those in office. The civil-service act does not forbid political activity further than to declare that no person in the public service is for that reason under any obligation to contribute to any political fund or to render any political service, and that no such person has any right to use his official authority or influence to coerce the political action of any person or body. The rules, in addition to affirming these provisions, forbid persons in the service from using their authority or influence for the purpose of interfering with an election or affecting the result thereof, and prohibit discrimination by any person in the service in favor of an applicant, eligible, or employee because of his political opinions.

This statement indicates that after 24 years of experience the Civil Service Commission concluded that the prohibitions in the Act and Rule against using official authority or influence to coerce the political action of others or interfere with elections did not suffice to control improper political activity by those in office.

On June 24, 1938, President Franklin Roosevelt issued an Executive Order authorizing the Commission to require disbursing officers to withhold the salary of classified employees who were not removed after being found in violation of the rule against political activity. Previous to this time, the Commission had

no independent power to enforce the rule; its function was limited to the investigation of reported violations and the making of findings and recommendations to the head of the Department concerned indicating the disciplinary action, if any, the Commission considered appropriate. See Fifty-Sixth Annual Report of the Civil Service Commission p. 47 (1940); *Howard, supra*, 35 Am. Pol. Sci. Rev. at pp. 474–475.

Although, as indicated, the Commission's enforcement powers had been limited, the concept of prohibited political activities under Rule I had been applied and refined by the Commission in case-by-case determinations upon investigations of alleged violations during the period from 1886 to the passage of the Hatch Act in 1939–1940. The concept thus evolved in much the same manner as common law principles evolved through judicial decisions. During this period, the Commission decided more than 2600 cases involving alleged political activity violations.

In many of these cases, the Commission was also considering charges of other violations, so that it is not possible to ascertain whether disciplinary action recommended by the Commission was based on the political activity charges. Moreover, in many of the cases, particularly earlier ones, the decision did not specify the type of political activity involved, so that it was of little precedential value (see 1 *Political Activity Reporter*, p. i (1971)). Nevertheless a large number of the decisions contain discussion and elucidation of the content of the political activity prohibition—in other words, at the time the Hatch Act was enacted the meaning of Civil Service Rule I was generally understood, although its application to particular cases of a borderline character may not in every instance have been clear.

B. THE CIVIL SERVICE COMMISSION'S ADMINISTRATION OF THE HATCH ACT

Both prior and subsequent to the passage of the Hatch Act, the Civil Service Commission periodically published informational pamphlets which defined with particularity the proscription against political management and campaigning, as well as other restrictions on political activities of government employees.[5] It was, in fact, a portion of the 1939 edition of the Commission's pamphlet on political activity (Form 1236) that Senator Hatch placed into the record during the debates on the 1940 amendments to the Act to explain the substantive prohibitions being incorporated into the Act by Section 15 (86 Cong. Rec. 2938–2940).

In 1970, the Commission promulgated regulations (5 C.F.R. Part 733) constituting a distillation of the interpretation of prohibited political activities contained in the pamphlets. In Section 733.111, the Commission sought to define and specify common types of political activity that are permitted to a federal employee under the Hatch Act:

> (a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—
>
> (1) Register and vote in any election;
>
> (2) Express his opinion as an individual privately and publicly on political subjects and candidates;

[5] The 1939 and 1966 editions of the Commission's Political Activity Pamphlet are reproduced in the Appendix in this Court (App. 89–116; App. 12–37). The 1942 and 1944 editions are printed in the Appendix to the Commission's *Political Activity Reporter*, beginning on pages 24 and 51, respectively. Ten sets of the *Poltical Activity Reporter*, which is a part of the record in this case, have been lodged with the Clerk.

(3) Display a political picture, sticker, badge, or button;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

(6) Attend a political convention, rally, fundraising function, or other political gathering;

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization;

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or

class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

In Section 733.122, the Commission defined the major areas of prohibited political management and campaigning:

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

As another aid to understanding the law, the Commission, in 1971, published a three volume work entitled *Political Activity Reporter,* which reproduces the 828 decisions rendered subsequent to enactment of the Hatch Act in adjudication of political activity cases. In addition, the *Reporter* contains historical material and a topical index and digest. The *Political Activity Reporter,* along with cumulative supplements, has been provided to federal agencies, federal courts, State law libraries, accredited law schools, State Attorneys General, United States Attorneys, the Democratic and Republican Party national headquarters, merit system councils, and to individual attorneys upon request. Additionally, the General Counsel's Office contains an Information Unit which is available to give "Hatch Act" briefings and which answers written and telephone inquires concerning the application of the Hatch Act. See App. 54–56.

A comparison of the current regulations and publications of the Commission on the interpretation of the restriction against partisan political management and political campaigning with the materials sub-

mitted by Senator Hatch to the Congress in 1940, describing the nature of the prohibition at that time, demonstrates a long standing and consistent interpretation. While it has made certain minor changes from the 1939 interpretation of the political management and campaigning restriction, the Commission has, in accordance with the congressional mandate in Section 15, administered the restriction in accordance with the basic outlines of its interpretation at the time of enactment of the Hatch Act.[6] The Commission's approach to political management and campaigning cases since the Hatch Act was described in the affidavit of its general counsel submitted in the court below (App. 56):

> In the light of this recognition in the legislative history that Form 1236[7] was the effective equivalent, for the factual situations it covered, of the pre-1940 determinations of the Commission, the Commission made extensive use of Form 1236 in its earlier decisions under the Hatch Act. Until the late 1940's, Form 1236 was also used extensively in the formulation of advisory opinions released by the Office of the General Counsel. As time passed, however,

[6] Changes from the 1939 interpretation, presumably designed primarily to accommodate the interpretation to those portions of the Hatch Act permitting public expression of opinion on political subjects and candidates and permitting non-partisan political activity, include elimination of the prohibitions against discussion of liquor questions, betting or wagering on elections, and participating in a political parade as the member of a musical organization or band (App. 99). In addition, the prohibition regarding publication of letters or articles in newspapers has been significantly modified, in part to conform with the decision in *Wilson* v. *United States Civil Service Commission*, *supra*. (Compare App. 99 with App. 25.)

[7] At the time the Hatch Act was enacted, the Commission's political activity pamphlet was designated "Form 1236."

both the Commission and the General Counsel made more and more use of decisions and opinions issued under the Hatch Act, and placed less and less reliance on Form 1236 as the body of post-Hatch Act precedent became enlarged.

The end result is that the Commission and the Office of the General Counsel today rely almost entirely on post-Hatch Act precedents, precedents which are based ultimately on the substantive content of Form 1236 and the Commission's pre-1940 determinations. The Office of the General Counsel has consistently endeavored to place its operations within the scope of both specific court decisions (e.g., *Wilson* v. *United States Civil Service Commission,* 136 F. Supp. 104, D.D.C. 1955), and discernible trends in judicial decisions generally. We certainly are aware of the great advances in the areas of individual liberties and due process that have taken place since 1940, and we attempt to administer the Hatch Act in the context of currently accepted constitutional doctrine and other legal doctrines. Should such doctrine collide with a strict interpretation of the Act, the Rule, or past administrative decisions, it is our policy that the current doctrines by which we are bound will prevail.

C. POST-HATCH ACT LEGISLATIVE ACTIVITIES

In 1966, nineteen years after the *Mitchell* and *Oklahoma* decisions, Congress decided that the Hatch Act's restrictions on partisan political activity by public employees needed review.[8] It established the Commis-

[8] In the interim, Congress had made a few minor changes in the Act, primarily involving the minimum sanction to be imposed for political activity violations (see note 2, *supra*, p. 19), but it was apparently generally satisfied with the operation of the Act.

sion on Political Activity of Government Personnel, a bipartisan group composed of members from the Congress, the executive branch of government, and private life. 80 Stat. 868.

Upon completion of its task, the Congressional Commission recommended liberalization of the political activity restrictions, and bills, identical to or with minor variances from the recommended bill of the Congressional Commission, have been introduced in each Congress since 1968. *E.g.*, H.R. 2372, 91st Cong., 1st Sess.; S. 2032, 92d Cong., 1st Sess. Other bills have been introduced that do not follow the Congressional Commission's recommendations, but which would substantially revise the Hatch Act. *E.g.*, H.R. 19214, 91st Cong., 2d Sess.; S. 3372, 92d Cong., 2d Sess. Most of these bills died without further action being taken by Congress. Hearings were held by the Senate Committee on Post Office and Civil Service in April 1972 on bills introduced by Senators McGee[9] and Moss[10], but no legislative action resulted. A number of bills have been introduced in the current Congress proposing new approaches to political activity restraints.[11] The Civil Service Commission is itself currently preparing proposed legislation on the subject for submission to Congress.

To date, however, Congress has not only declined to narrow the political activity provisions, but has actually extended their application to persons not previously covered. In the Economic Opportunity Act of 1964, as amended, the political activity restrictions were extended to certain employees of private cor-

[9] S. 3374, 92d Cong., 2d Sess.
[10] S. 3417, 92d Cong., 2d Sess.
[11] H.R. 668, S. 350, S. 235, 93d Cong., 1st Sess.

porations (42 U.S.C. 2943); in the Postal Reorganization Act, the provisions were specifically made applicable to the Postal Service (39 U.S.C. 410); and in the Emergency Employment Act of 1971, the provisions were extended to personnel employed in the administration of the programs established thereunder (42 U.S.C. (Supp. 1) 4881(h)).

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